Madurai Veeran a/l Gopal v Industrial Court Malaysia & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R1-25-103 OF 1992
NIK HASHIM JC
14 AUGUST 1997

Civil Procedure *— Time — Computation of — Court vacation, whether to be excluded in computation — Filing of ex parte notice of motion pursuant to O 53 of the Rules of the High Court 1980 — Whether period of court vacation was to be excluded in computation of time period for filing the ex parte notice of motion — Rules of the High Court 1980 O 3 r 3 & O 53 rr 1A & 2*

Civil Procedure *— Service — Companies — Service at head office of company — Notice of motion was left with staff at head office of company — Whether service properly effected — Rules of the High Court 1980 O 64 r 4(1) — Companies Act 1965 s 350*

The applicant was dismissed by the second respondent on 30 May 1990. Being dissatisfied with the dismissal, the applicant filed representations under s 20 of the Industrial Relations Act 1967 to have the matter referred to the Industrial Court for adjudication. After having heard the matter, the Industrial Court in an award dated 22 May 1992 dismissed the applicant's claim. The applicant then proceeded to file an ex parte notice of motion on 17 July 1992 for leave to obtain an order of certiorari to quash the award and and an order of mandamus for the Industrial Court to rehear the matter. The requisite leave was obtained by the applicant on 26 January 1993 and the notice of motion was fixed for hearing on 23 March 1994. At the hearing date, in view of the absence of the second respondent and/or its solicitors, the applicant obtained the orders prayed by default. The second respondent vide encl 18 sought to set aside the order obtained in default on the basis that: (i) the ex parte notice of motion was filed out of time; and (ii) there was a lack of proper service under O 64 r 4(1)(c) of the Rules of the High Court 1980 ('the RHC'). In deciding on the first issue, the learned judge had to consider whether the court vacation from 25 May to 8 June 1992 was to be excluded in computing the six-week period wherein an application for leave must be made after the date of award under O 53 r 1A of the RHC. In this regard, the learned judge had to construe the provisions of O 3 r 3 and O 53 r 2 of the RHC. With regard to the second issue, the second respondent contended that the ex parte notice of motion was left with a staff of the second respondent at its head office and that the purported service was bad. The applicant argued that by virtue of the provisions of s 350 of the Companies Act 1965 ('the Act'), the service was good and proper. The applicant further submitted that encl 18 ought to have been filed as soon as possible after the second respondent discovered that the order in default had been obtained and not delayed the same.

Held, dismissing the application with costs:

(1) Order 3 r 3 of the RHC applied to an application filed pursuant to O 53 of the RHC. Order 53 r 1A specifies the period of six weeks whereas O 3 r 3 provides the manner in which the period was to be calculated, that is by excluding the court vacation. If the application was made during court vacation, O 53 r 2 provides that it shall be made to a judge in chambers. These two rules complement each other and had equal statutory force. Therefore, in this case, the period of court vacation from 25 May to 8 June 1992, a period of 15 days with both dates inclusive, was to be excluded in reckoning the six-week period as prescribed under O 53 r 1A of the RHC and the ex parte notice of motion filed on 17 July 1992 was well within the time of six weeks from the date of the award on 22 May 1992 (see pp 697G–I and 698A).

(2) A service on a corporation is good service if it complied with any of the paragraphs of O 62 r 4(1) of the RHC or s 350 of the Act whichever was applicable to the facts of the case. Neither s 350 of the Act nor O 62 r 4(1)(a) of the RHC stipulates that the documents must be served on any person in particular. What is of importance is the registered office where the documents were served. The second respondent admitted that the notice of motion was left with a staff of the second respondent at the latter's office. By this admission, it was abundantly clear that the second respondent was properly served with the notice of motion and was aware of the proceedings against it (see p 698F–I).

(3) The second respondent filed encl 18 five months after the order of 23 March 1994 without offering any explanation whatsoever. Under O 35 r 2(2) of the RHC, the application must be made within seven days after the trial. There was no application to extend time in this case. In the absence of any leave granted by the court to file outside the time limit, the second respondent was barred from filing this application to set aside the order which was regularly obtained (see p 699G–H).

[Bahasa Malaysia summary

Pemohon telah dipecat oleh penentang kedua pada 30 Mei 1990. Oleh kerana pemohon tidak puas hati dengan pemecatan, dia memfailkan representasi di bawah s 20 Akta Perhubungan Perusahaan 1967 supaya hal itu dirujuk kepada Mahkamah Perusahaan untuk penghukuman. Selepas membicarakan perkara itu, Mahkamah Perusahaan dalam satu award bertarikh 22 Mei 1992 menolak tuntutan pemohon. Pemohon seterusnya memfailkan notis usul ex parte pada 17 Julai 1992 untuk kebenaran mendapatkan perintah certiorari untuk membatalkan award dan satu perintah mandamus untuk Mahkamah Perusahaan membicarakan semula perkara itu. Kebenaran yang dikehendaki telah diperolehi oleh pemohon pada 26 Januari 1993 dan notis usul ditetapkan untuk pembicaraan pada 23 Mac 1994. Pada tarikh pembicaraan, memandangkan

ketidakhadiran penentang kedua dan/atau peguamcaranya, pemohon memperolehi perintah yang dipohon disebabkan keingkaran. Penentang kedua menerusi lampiran 18 meminta supaya perintah yang diperolehi menerusi keingkaran diketepikan atas alasan bahawa: (i) notis usul ex parte difailkan di luar masa; dan (ii) terdapat kekurangan penyampaian yang elok di bawah A 64 k 4(1)(c) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Dalam memutuskan isu pertama, hakim yang arif harus mempertimbangkan sama ada cuti mahkamah dari 25 Mei hingga 8 Jun 1992 hendaklah ditolak dalam mengira tempoh enam minggu di mana satu permohonan untuk kebenaran mestilah dibuat selepas tarikh award di bawah A 53 k 1A KMT. Sehubungan itu, hakim yang arif harus mentafsir peruntukan A 3 k 3 dan A 53 k 2 KMT. Mengenai isu kedua pula, penentang kedua menghujahkan bahawa notis usul ex parte telah ditinggalkan dengan seorang kakitangan penentang kedua di ibu pejabatnya dan bahawa penyampaian yang dikatakan adalah tidak elok. Pemohon berhujah bahawa disebabkan peruntukan s 350 Akta Syarikat 1965 ('Akta tersebut'), penyampaian itu adalah elok dan betul. Pemohon seterusnya berhujah bahawa lampiran 18 sepatutnya difailkan secepat mungkin selepas penentang kedua mendapati bahawa perintah ingkar telah diperolehi dan tidak menangguhkan yang sama.

Diputuskan, menolak permohonan dengan kos:

(1) Aturan 3 k 3 KMT terpakai kepada permohonan yang difailkan menurut A 53 KMT. Aturan 53 k 1A menetapkan tempoh enam minggu manakala A 3 k 3 memperuntukkan cara bagaimana tempoh itu patut dikira, iaitu dengan menolak cuti mahkamah. Sekiranya permohonan dibuat sewaktu cuti mahkamah, A 53 k 2 memperuntukkan bahawa ia haruslah dibuat kepada hakim dalam kamar. Kedua-dua kaedah ini saling melengkapi dan mempunyai kuasa berkanun yang sama. Maka, dalam kes ini, tempoh cuti mahkamah dari 25 Mei hingga 8 Jun 1992, suatu tempoh 15 hari termasuk kedua-dua tarikh, hendaklah ditolak dalam pengiraan tempoh enam minggu seperti yang ditetapkan di bawah A 53 k 1A KMT dan notis usul ex parte yang difailkan pada 17 Julai 1992 adalah dalam tempoh enam minggu dari tarikh award pada 22 Mei 1992 (lihat ms 697G–I dan 698A).

(2) Penyampaian kepada perbadanan adalah penyampaian yang elok sekiranya ia mematuhi mana-mana perenggan A 62 k 4(1) KMT atau s 350 Akta tersebut mengikut mana-mana yang terpakai kepada fakta-fakta kes. Baik s 350 Akta tersebut mahupun A 62 k 4(1)(a) KMT menetapkan bahawa dokumen-dokumen mestilah disampaikan kepada mana-mana orang yang tertentu. Apa yang penting adalah pejabat berdaftar di mana dokumen-dokumen disampaikan. Penentang kedua mengakui bahawa notis usul telah ditinggalkan dengan seorang kakitangan penentang kedua di pejabatnya. Dengan pengakuan ini, adalah amat jelas bahawa penentang kedua telah disampaikan dengan notis usul dan sedar akan prosiding terhadapnya (lihat ms 698F–I).

(3) Penentang kedua memfailkan lampiran 18 lima bulan selepas perintah bertarikh 23 Mac 1994 tanpa menawarkan sebarang penjelasan. Di bawah A 35 k 2(2) KMT, permohonan mestilah dibuat dalam masa tujuh hari selepas perbicaraan. Tiada permohonan untuk melanjutkan masa dalam kes ini. Dalam ketiadaan apa-apa kebenaran yang diberikan oleh mahkamah untuk memfail di luar had masa, penentang kedua dihalang daripada memfailkan permohonan ini untuk mengetepikan perintah yang diperolehi mengikut aturan (lihat ms 699G–H).]

Notes

For a case on computation of time, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) para 3565.

For cases on service on companies, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2966–2970.

Cases referred to

Bosco Philip Anthony v Electrical Industry Workers Union & Anor [1997] 2 CLJ (Supp) 398 (refd)

Commissioner of Income Tax v Shahzada Nand & Sons AIR 1966 SC 1342 (refd)

Khor Cheng Wah v Sungai Way Leasing Sdn Bhd [1996] 1 MLJ 223 (refd)

Lee Boon Tatt & Ors v Takhdir Trading Sdn Bhd [1984] 2 MLJ 341 (refd)

Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719 (refd)

Mersing Omnibus Co Sdn Bhd v Minister of Labour and Manpower & Anor [1983] 2 MLJ 54 (refd)

PP v Chew Siew Luan [1982] 2 MLJ 119 (refd)

Singh v Atombrook Ltd [1989] 1 All ER 385 (refd)

Smith v Clay (1767) 3 Bro CC 639n (refd)

Legislation referred to

Companies Act 1965 s 350

Employment Act 1955 ss 13(2), 15(2)

Industrial Relations Act 1967 s 20

Rules of the High Court 1980 O 1 r 4, O 3 r 3, O 35 rr 2, 2(2), O 53 rr 1, 1A, 1(2), 2, O 62 r 4(1), (1)(a), (1)(c), O 65

Lloyd Fernando (*Abd Shukor bin Ahmad* with him) (*Lloyd Fernando & Razak*) for the applicant.

P Jayasingam (*Julia Mah* with him) (*Albar Zulkifly & Yap*) for the second respondent.

Nik Hashim JC: By encl 18, the second respondent, Sykt Telekom Malaysia Bhd applied for the following:

(i) the second respondent be granted liberty to set aside the leave and consequential orders of this court obtained on 26 January 1993; A

(ii) the second respondent be granted liberty to set aside the order of certiorari and consequential orders of this court obtained pursuant to such leave on 23 March 1994 in default;

(iii) the leave and consequential orders of this court obtained on 26 January 1993 be set aside; B

(iv) the order of certiorari and consequential orders of this court obtained pursuant to such leave on 23 March 1994 in default be set aside;

(v) all further proceedings in Industrial Court Case No 5/4–56/91 be stayed pending the disposal of this application; and C

(vi) costs.

The brief facts of the case as aptly set out in the written submission of learned counsel for the second respondent, Mr P Jayasingam, are that the applicant was dismissed by the second respondent on 30 May 1990 pursuant to s 15(2) read together with s 13(2) of the Employment Act D 1955. Being dissatisfied with the second respondent's action, the applicant filed representations under s 20 of the Industrial Relations Act 1967 to have his case referred to the Industrial Court for adjudication. The matter was heard in the Industrial Court. By its award dated 22 May 1992, the Industrial Court dismissed the applicant's claims and handed down a E decision in favour of the second respondent. Being dissatisfied with the award, the applicant vide an ex parte notice of motion dated 17 July 1992 filed an application for leave to obtain an order of certiorari to quash the said award and an order for mandamus to the Industrial Court to rehear the matter. The applicant was granted leave on 26 January 1993 to commence certiorari proceedings and for his application for mandamus. F Pursuant to the leave, the applicant filed the requisite notice of motion and it was fixed for hearing on 23 March 1994. On the date of hearing, the applicant obtained the orders prayed for in the notice of motion by default as the second respondent and/or its solicitors were not present in court.

It is significant to note at the outset that there was a court vacation G from 25 May 1992 to 8 June 1992. The ex parte notice of motion was filed on 17 July 1992, that is 56 days after the date of the award which was 22 May 1992. It is also to be noted that an application for leave must be made within six weeks (42 days) after the date of the award: O 53 r 1A of the Rules of the High Court 1980 ('the Rules'); *Mersing Omnibus Co Sdn Bhd v Minister of Labour and Manpower & Anor* [1983] 2 MLJ 54; *Bosco* H *Philip Anthony v Electrical Industry Workers Union & Anor* [1997] 2 CLJ (Supp) 398. With regard to the service of the notice of motion, the applicant at encl 11 said that it was served on a manager of the second respondent while the second respondent through affidavit at encl 17 claimed that the motion was left with a staff of the second respondent at I its head office.

Mr P Jayasingam for the second respondent contended that the order obtained in default by the applicant ought to be set aside as the ex parte

notice of motion filed by the applicant was filed out of time and by virtue of the fact that there was no proper service of the notice of motion under O 62 r 4(1)(c) of the Rules.

Dr Lloyd Fernando for the applicant, on the other hand, submitted that the ex parte notice of motion was filed within time by virtue of O 3 r 3 of the Rules. With respect to the service, he argued that there was a proper service of the notice of motion on the second respondent and cited s 350 of the Companies Act 1965 ('the Act') in support.

Order 3 r 3 of the Rules provides:

> ... the *period of the Court Vacation shall be excluded in reckoning any period prescribed by these rules* or by any order or direction for serving, filing or amending any pleading. (Emphasis added.)

It was the contention of Mr P Jayasingam that O 3 r 3 has no application to an application filed pursuant to O 53 of the Rules. According to him,in an application for leave filed pursuant to O 53 r 1, where there is a court vacation, the rules specifically provide for the application to be made to a judge in chambers. Therefore, O 53 r 2 overrides the general provisions found in O 3 r 3, thus, generalia specialibus non derogant applies and quoted *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719; *Commissioner of Income Tax v Shahzada Nand & Sons* AIR 1966 SC 1342 and *PP v Chew Siew Luan* [1982] 2 MLJ 119 in support of his argument.

Order 53 r 1(2) of the Rules states:

> An application for such leave must be made ex parte to the Court, *except in vacation when it may be made to a Judge in Chambers*, and must be supported by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and by affidavits, to be filed before the application is made, verifying the facts relied on. (Emphasis added.)

It is my considered judgment and I so hold that O 3 r 3 does apply to an application filed pursuant to O 53 of the Rules. Therefore, in this case, the period of the court vacation, ie from 25 May to 8 June 1992, a period of 15 days, both dates inclusive, is to be excluded in reckoning the six-week (42 days) period as prescribed under O 53 r 1A. Order 3 r 3 talks about the period which if it falls within the court vacation, such period is to be excluded for the purpose of calculating the period prescribed by the Rules. If an application is filed pursuant to O 53 during a court vacation, then such an application is to be made to a judge in chambers. In other words, O 53 r 1A specifies the period of six weeks, whereas O 3 r 3 provides how the period should be calculated, that is by excluding the court vacation. Therefore, Mr P Jayasingam's efforts to emphasize that O 53 r 2 is in conflict with O 3 r 3 and his attempt to disregard the period of court vacation as provided under the first limb of O 3 r 3 ('the period of the court vacation shall be excluded in reckoning any period prescribed by these rules or ...') must necessarily fail. There is no conflict between these two rules. With respect, I agree with Dr Lloyd Fernando's submission that the two rules complement each other and have equal statutory force.

Thus, by excluding 15 days of the court vacation from 25 May to 8 June 1992, the ex parte notice of motion which was filed on 17 July 1992 is well within the time of six weeks from the date of the award, ie 22 May 1992. That being so, there is no need for any extension of time in the present case.

Regarding the service, the relevant provisions to be considered are s 350 of the Act and O 62 r 4 of the Rules. Section 350 provides:

> *A document may be served on a company by leaving it at* or sending it by registered post to *the registered office of the company.* (Emphasis added.)

Order 62 r 4 provides four modes of service, namely:

> (1) Where an action is against a corporation, the writ may be served —
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> (a) by leaving a copy of it at the registered office (if any) of the corporation; or
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> (b) by sending a copy of it by registered post addressed to the corporation at the office, or, if there be more offices than one at the principal office of the corporation, whether such office be situated within Malaysia or elsewhere; or
>
> (c) by handing a copy of it to the secretary or to any director or other principal office of the corporation; or
>
> (d) in the case of a foreign company or registered under Part XI of the Companies Act 1965 by handing a copy of it to, or sending the same by registered post to, a person authorized to accept service of process on behalf of the foreign company.

Counsel for the second respondent did not refer in his submission to s 350 of the Act. Instead, he contended that service of the notice of motion can be considered good service only if it is in compliance with O 62 r 4(1)(c). In my view, a service is good service if the service complies with any of the paragraphs of O 62 r 4(1) or s 350, whichever is applicable to the facts of each case. Good service is not confined to service under O 62 r 4(1)(c) alone as contended by counsel. It is pertinent to note that the provisions of s 350 and O 62 r 4(1)(a) are somewhat similar — ie service on corporations. However, s 350 refers to service of documents while O 62 r 4(1) refers to service of writs. Neither s 350 nor O 62 r 4(1)(a) stipulates that the documents must be served on any person in particular. What is important in the service is the registered office where the documents were served. Mat Nordi bin Awang, the Industrial Relations Manager of the second respondent in his affidavit at encl 17 did admit at para 13 that the notice of motion was left with a staff of the second respondent's head office who inadvertently misplaced the said notice without bringing the same to the attention of the second respondent's management staff. By this admission, it is abundantly clear that the second respondent was served with the notice of motion and was therefore aware of the proceeding against it. Thus, since the notice of motion is not a writ (see O 1 r 4) but a document and the second respondent is a company, I hold that the service was in compliance with the requirement of s 350 and therefore, the notice of motion was properly served on the second respondent. Hence, the service was good service (see *Lee Boon Tatt & Ors v Takhdir Trading Sdn Bhd* [1984] 2 MLJ 341 and *Singh v Atombrook Ltd* [1989] 1 All ER

385). However, that is not the end of the matter. There is another matter which needs my consideration as well.

It was argued that the second respondent's application for leave to set aside the ex parte order and for its application to set aside the said order was filed as soon as practicable after the second respondent had discovered that an order in default had been obtained against the second respondent. Counsel for both parties, however, did not touch on O 35 r 2 of the Rules which states:

> (1) Any judgment or order obtained where one party does not appear at the trial may be set aside by the Court, on the application of that party, on such terms as it thinks just.
>
> (2) Any application under this rule must be made within 7 days after the trial.

The second respondent filed this application on 26 August 1994 against an order made on 23 March 1994. The second respondent acknowledged through the affidavit of Mat Nordi (encl 17) that it was aware of the order on 28 March 1994 but nevertheless delayed this application. There was no explanation for the delay in approaching the court. On the question of delay, Gopal Sri Ram JCA in *Khor Cheng Wah v Sungai Way Leasing Sdn Bhd* [1996] 1 MLJ 223 observed at p 229:

> It is a cardinal principle of law, that when a litigant seeks the intervention of the court in a matter that affects his rights, he must do so timeously. The maxim *vigilantibus, non dormientibus, jura subveniunt*, though having its origins in the Court of Chancery, is of universal application. Even in cases where a right is exercisable ex debito justitiae, a court may refuse relief to an indolent litigant.
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> In all cases in which delay in approaching the court is in issue, the burden is upon the litigant who has delayed to render a satisfactory explanation for it. Whether the explanation in a given case is satisfactory or reasonable depends upon the facts and circumstances of each case. And in a matter which involves the exercise of discretion, it is for the judge in whom the law primarily vests the discretion.

In the present case, the second respondent filed the application five months late without offering any explanation whatsoever. Under O 35 r 2(2) of the Rules, the application must be made within seven days after the trial. There was no application for the extension of time in this case. So, in the absence of any leave granted by the court to file the application outside the time limit, the second respondent is barred from filing this application to set aside the order which was regularly obtained. It would be unjust to allow the second respondent to procrastinate at the expense of the applicant (see per Lord Camden in *Smith v Clay* (1767) 3 Bro CC 639n).

In the circumstances, for the reasons hereinbefore stated, I hold that this application is misconceived and must be, and is, dismissed with costs.

Application dismissed.

Reported by Lew Chee Seong